U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF T-A-I-

DATE: JAN. 4, 2018

APPEAL OF TEXAS SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, a provider of [redacted] health services,[1] seeks to employ the Beneficiary as a director of [redacted] research, and classify him as a member of a profession holding an advanced degree or an individual of exceptional ability. *See* Immigration and Nationality Act section 203(b)(2), 8 U.S.C. § 1153(b)(2). It has applied for the Beneficiary under a labor certification pursuant to 20 C.F.R. § 656.5, Schedule A, Group II. Schedule A, Group I as well as Group II, is comprised of certain occupations for which the Department of Labor has determined there are not sufficient United States workers who are able, willing, qualified, and available, and that the employment of these foreign nationals will not adversely affect the wages and working conditions of similarly employed United States workers. *Id.*

The Director of the Texas Service Center denied the petition due to abandonment, finding that the Petitioner did not timely respond to his notice of intent to deny (NOID) the petition. He subsequently denied the Petitioner's motion to reconsider the matter.[2] On appeal, the Petitioner maintains that it had not abandoned the petition.

Upon *de novo* review, we will withdraw the Director's decision denying the Petitioner's motion to reconsider the matter, and remand the case for further consideration and the issuance of a new decision.

I. LAW

The regulation provides that the Director may summarily deny a petition as abandoned if a petitioner "fails to respond to . . . a notice of intent to deny by the required date." 8 C.F.R. § 103.2(b)(13). The petitioner may not appeal a denial due to abandonment, but may file a motion to reopen the proceedings under 8 C.F.R. § 103.5. The relevant provision of the regulation states that a motion to

[1] The Petitioner indicates in its initial filing that '[redacted] medicine has a long and noble tradition in India" but "it is little known about and even less understood in the West."

[2] While the Petitioner categorized the motion as a motion to reconsider the matter, it was also a motion to reopen, because it included additional evidence, such as U.S. Postal Service delivery confirmation, for the Director's consideration.

reopen a petition denied due to abandonment must be filed with evidence that the decision was in error because:

(i) The requested evidence was not material to the issue of eligibility;

(ii) The required initial evidence was submitted with the application or petition, or the request for initial evidence or additional information or appearance was complied with during the allotted period; or

(iii) The request for additional information or appearance was sent to an address other than that on the application, petition, or notice of representation, or that the applicant or petitioner advised the [U.S. Citizenship and Immigration Services (USCIS)], in writing, of a change of address or change of representation subsequent to filing and before the [USCIS'] request was sent, and the request did not go to the new address.

8 C.F.R. § 103.5(a)(2).

II. ANALYSIS

On appeal, the Petitioner maintains that it had timely responded to the Director's NOID, explaining that because the NOID did not specify where it should send its response, it sent the submission to a Texas Service Center mailing address listed on the USCIS website. The record confirms the Petitioner's statement as relating to the ambiguity of the instructions in the NOID for filing a response, and establishes that the Petitioner sent its response to a Texas Service Center address, which received the submission within the filing deadline. In light of the above, the Petitioner has shown that it responded to the Director's NOID during the allotted period, and thus, did not abandon the petition. *See* 8 C.F.R. § 103.5(a)(2)(ii). Accordingly, we will withdraw the Director's decision denying the Petitioner's motion.

Notwithstanding the above, the record does not appear to demonstrate the Petitioner's eligibility. Upon remand, the Director should consider issues including but not limiting to whether: (1) the Beneficiary possesses the necessary 10-year qualifying work experience specified in part H of the ETA Form 9089, Application for Permanent Employment Certification;[3] (2) he has achieved "widespread acclaim and international recognition . . . by recognized experts in [the] field" of ayurvedic health services; and (3) his "work in that field during the past year did, and [his] intended work in the United States will, require exceptional ability." *See* 20 C.F.R. § 656.15(d)(1); *see also* 8 C.F.R. § 204.5(a)(2), (k)(4); 20 C.F.R. § 656.15.

[3] In its NOID response submission, the Petitioner offered an amended ETA Form 9089. However, a petitioner may not modify a labor certification accepted for processing after July 16, 2007. *See* 20 C.F.R. § 656.11(b).

III. CONCLUSION

We will remand this case to the Director for further consideration of the Petitioner's eligibility to classify the Beneficiary as a member of a profession holding an advanced degree or an individual of exceptional ability.

ORDER: The decision of the Director is withdrawn. The matter is remanded for further proceedings consistent with the foregoing opinion and for the entry of a new decision, which, if adverse, shall be certified to us for review.

Cite as *Matter of T-A-I-*, ID# 746521 (AAO Jan. 4, 2018)